In the Supreme Court of the United States

OCTOBER TERM, 1952.

No. 238.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

GAMBLE ENTERPRISES, INC.,
Respondent.

BRIEF OF RESPONDENT.

FRANK C. HEATH,
H. CHAPMAN ROSE,
1759 Union Commerce Building,
Cleveland 14, Ohio,
Attorneys for Respondent.

JONES, DAY, COCKLEY & REAVIS,
Of Counsel.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—MAIN 1-9847

TABLE OF CONTENTS.

TABLE OF AUTHORITIES.

Cases.

Texts.

Statutes.

In the Supreme Court of the United States

OCTOBER TERM, 1952.

No. 238.

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

GAMBLE ENTERPRISES, INC.,

Respondent.

BRIEF OF RESPONDENT.

OPINIONS BELOW.

The opinion of the National Labor Relations Board is reported at 92 N. L. R. B. 1528 (1951). The opinion of the Court of Appeals for the Sixth Circuit is reported at 196 F. 2d 61 (C. A. 6, 1952).

JURISDICTION.

This Court has jurisdiction of this proceeding by reason of Title 29 United States Code § 160(e).

Certiorari was granted October 13, 1952.

QUESTIONS PRESENTED.

Section 8(b)(6) of the National Labor Relations Act makes it an unfair labor practice for a union to cause or attempt to cause an employer to make or agree to make payments in the nature of an exaction for services which are not performed or not to be performed.

The question in this case is whether under the facts of this record the stand-by orchestra practices of the American Federation of Musicians, Local No. 24, violated this provision.

STATUTES INVOLVED.

Section 8(b)(6) of the National Labor Relations Act is the only statutory provision put into question by this case. This Section reads:

> "It shall be an unfair labor practice for a labor organization or its agents
>
> * * * * *
>
> "to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed." (61 Stat. 140; 29 U. S. C. § 158(b)(6).)

STATEMENT.

This is a labor law case.

It calls for application of the new anti-feather-bedding provision of the Taft-Hartley Act. Under this section Respondent employer filed an unfair labor practice charge against a union. Petitioner National Labor Relations Board, by a split decision, held that there had been no violation and dismissed the complaint. On review the Court of Appeals for the Sixth Circuit reversed, set aside the order of dismissal and remanded the cause to the Board. The Board seeks in this Court to overturn the decision of the Court of Appeals.

The facts are well established.*

Respondent is the complainant employer, Gamble Enterprises, Inc., a Washington corporation operating a chain of theatres in several states. (R. 98-100; Ex. 2, R. 285.) Petitioner is the National Labor Relations Board. American Federation of Musicians, Local No. 24, of Akron, Ohio, was respondent in the proceedings before the Board

---

* Citations are to the printed certified record, abbreviated "R." and General Counsel's Exhibits reprinted therein abbreviated "Ex."

and an intervenor in Court of Appeals. These parties are referred to, respectively, as the employer, the Board and the union.

The issue concerns the operation of the employer's Palace Theatre in Akron, Ohio. The Palace has, since the decline of vaudeville, followed a policy of showing motion pictures with an occasional presentation on its stage of traveling "name" bands of national reputation. (R. 101, 103, 75, 79.) For many years prior to 1947 whenever such a name band was hired to play an engagement at the Palace the employer was required to pay full wages for an additional orchestra of nine local musicians. (R. 71, 72, 74; Ex. 5, R. 287.) This local orchestra held regular rehearsals at the Palace and held itself available to work. (R. 65, 69, 70, 71, 84.) But it seldom reported, and except on rare occasions it did not actually play. (R. 64, 67, 69.) It was what is known as a "stand-by" orchestra. (R. 73.) It stood by.

On June 23, 1947 the Labor Management Relations Act of 1947, embodying the Taft-Hartley amendments to the National Labor Relations Act, was enacted, effective August 22, 1947. (61 Stat. 136.) Among other things, the Taft-Hartley Act introduced into the National Labor Relations Act the following provision:

Section 8(b)(6):

> "It shall be an unfair labor practice for a labor organization or its agents
>
> "to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed."

The practice of paying stand-by musicians at the Palace stopped between the date this provision was en-

acted and the date it took effect. The last engagement for which payment was made for the stand-by orchestra was on July 2, 1947. (R. 97, 104; Ex. 5, R. 287.)

Between July 2, 1947 and November 12, 1947 the Palace Theatre played seven performances of traveling name bands on its stage without being required to pay local musicians to stand by. (R. 104.) Until late October the union made no objection and no demands for such stand-by employment. (R. 105.)

In October of 1947 the secretary and business manager of the union, one Mr. Teagle, called upon the employer's directing manager of the Palace, a Mr. Gamble. Teagle demanded that Gamble employ an orchestra of nine local musicians whenever a name band performed. It was Teagle's post-Taft-Hartley approach that these local musicians would not be hired to do nothing; they would play overtures and intermissions at the performances of the nationally known orchestras. (R. 105.)

Gamble made clear to Teagle what many years of experience had shown to be true in the operation of the Palace. The employer had had to pay off a stand-by orchestra of local musicians for many years. But the local orchestra was not needed. It was not wanted. It had no drawing power. It detracted from the name band's performance. It was a general interference in the operation of the Theatre. And consequently, though already paid for, it was almost never used. (R. 105.)

Under these circumstances the employer refused Teagle's demand. (R. 107.)

Teagle continued to insist upon simultaneous appearance of a local orchestra with each name band, however, and barbed his demand with a warning. Traveling bands would not be permitted to appear at the Palace until an agreement on this issue had been reached with the union. (R. 106.)

Discretionary power to admit or exclude traveling bands lay in the hands of the local through Section 4 of Article 18 of the Constitution and By-Laws of the American Federation of Musicians:

> "Section 4. Traveling members cannot, without the consent of a Local, play any presentation performances in its jurisdiction unless a local house orchestra is also employed." (R. 233, 374; Ex. 3, R. 393.)

At the time of these discussions the Palace had already scheduled the appearance on its stage on November 20, 1947, of a traveling orchestra known as the Ray Eberle Band. (R. 105.) On November 18, 1947, the agency through which the employer had booked the Ray Eberle Band received the following telegram from James C. Petrillo, President of the American Federation of Muscians, the national union.

> "AS PER TELEPHONE CONVERSATION RAY EBERLY AND HIS ORCHESTRA CANNOT APPEAR AT THE PALACE THEATRE IN AKRON OHIO UNTIL THIS THEATRE HAS REACHED AN AGREEMENT WITH LOCAL 24 OF THE AMERICAN FEDERATION OF MUSICIANS." (R. 107; Ex. 13, R. 331.)

The Ray Eberle show did not fulfill its scheduled engagement at the Palace Theatre. (R. 107.)

No further meetings between Gamble and Teagle took place for over a year. (R. 108.) Nor did the Theatre book any traveling bands. Early in 1949, however, Gamble attempted to secure Teagle's consent to the booking of name bands with accompanying vaudeville acts without hiring local musicians simultaneously. (R. 109.) Teagle was adamant. Name bands could not be booked at the Palace Theatre unless local musicians were also hired.

On May 8, 1949, a meeting of representatives of the union and of Petitioner was held at Teagle's office. (R.

110.) Various suggestions were made at this meeting. The offer to play overtures and intermissions was repeated. It was suggested that the local orchestra play music for vaudeville acts, not an integral part of the name bands' ensemble. (R. 111.) Again, a suggestion was offered that the local orchestra perform from the stage with miscellaneous vaudeville acts assembled by the employer, one such show to be required for each appearance of a name band. (R. 113, 114.) The Palace management maintained its position, however, that the local orchestra had no drawing power and that its performance in the pit simultaneously with a name band or its specialized performers not only would be lacking in entertainment value but would constitute an interference. A tentative arrangement between Gamble and Teagle was reached at this meeting, but the union's executive board did not take favorable action upon it. (R. 111, 115; Ex. 17, R. 336; Ex. 18, R. 337.)

On May 16th, 1949, the employer filed an unfair labor practice charge against the union. (Ex. 1-A, R. 1.)

On June 24, 1949, Gamble advised Teagle by letter that the Palace would resume its former practice of engaging traveling name bands. (Ex. 20, R. 338.)

On July 26, 1949, the Theatre management executed a contract for the appearance on August 18th of a name band, "Roy Acuff and His Grand Ole Apry" with certain accompanying acts. (R. 146.)

Gamble informed Teagle of this booking. (R. 52.) Teagle also received a phone call and a telegram from the manager of the Acuff show, inquiring whether the show would be permitted to fill its engagement at the Palace. Teagle replied that no agreement had been consummated between the union and the employer. (R. 51.)

In addition, the agent received the following letter from the President of the American Federation of Musicians, dated August 4, 1949:

> "We have been advised that you contemplate booking Roy Acuff into a theatre in Akron, Ohio. The local there advises us that no agreement has been reached between the theatre and our local union.
>
> "Under the circumstances, Federation members are not permitted to play there until negotiations for an agreement are consummated.
>
> Very truly yours,
>
> James C. Petrillo,
>
> *President.*"
>
> (R. 116; Ex. 22, R. 342.)

The Roy Acuff show did not fill its August 18th engagement at the Palace Theatre. (R. 116.)

Subsequent interchanges of letters between Gamble and Teagle yielded no agreement. A tentative two show arrangement discussed by Gamble and Teagle in December, 1949, was rejected by the employer in view of the imminence of hearings in this proceeding. (R. 118, 120.)

On November 16, 1949, the employer filed an amended charge against the union, charging it with engaging in unfair labor practices affecting commerce within the meaning of the National Labor Relations Act, 49 Stat. 449, as amended by the Labor-Management Relations Act, 1947, 61 Stat. 136. (Ex. 1-C, R. 4.) Specifically, the employer charged the union with an unfair labor practice under Section 8 (b) (6) of the Act. The General Counsel of the National Labor Relations Board issued a complaint against the union dated January 3, 1950, and hearings were duly held before a trial examiner on March 14, 15 and 16, 1950. (Ex. 1-E, R. 6.)

The trial examiner found that the employer was engaged in commerce within the meaning of the Act and recommended that the Board assert its jurisdiction. (R. 343 *ff.*) He further found that the union's acts constituted a violation of Section 8 (b) (6), but recommended that the complaint be dismissed, since, in his view, the employer had waived its rights by contract.

The Board was unanimous in its conclusion respecting the employer's engagement in commerce and asserted jurisdiction. (R. 370, 371.)

The majority of the Board, however, rejected the trial examiner's conclusion that the union's acts constituted an unfair labor practice under Section 8 (b) (6). It was the view of two Members of the Board that the union was primarily interested in securing bona fide employment for its members, that there was no evidence that the local musicians would not perform the offered services, that Section 8 (b) (6) is applicable only where the union members do absolutely nothing in exchange for payments, and that it is inapplicable if the labor organization performs any act at all, "even in situations where the employer does not want, does not need, and is not willing to accept such services." (R. 370, 378; 92 NLRB 1528, 1533.)

Member Reynolds dissented from this proposition. He further rejected the trial examiner's waiver theory and passed upon certain evidentiary issues which the majority had not found it necessary to consider in their view of the case. (R. 379.)

Pursuant to the decision of the majority of the Board, the complaint filed against the union was ordered dismissed. (R. 379.) Member Reynolds would have found the union guilty of unfair labor practices under Section 8 (b) (6).

The employer filed a petition for review and reversal in the Court of Appeals for the Sixth Circuit on May 17, 1951, naming the Board as respondent. (R. 386.) The union appeared as an intervenor. The Court of Appeals reversed the decision of the Board and held "the only reasonable inference to be drawn from undisputed facts" to be that the union's effort "to force the theatre to pay for services not needed and of detriment to it was clearly an exaction," that the acts sought to be done by the union were not practices normally incident to services required by the employer, and that therefore the union had violated Section 8 (b) (6). 196 F. 2d 61, 63 (C. A. 6, 1952). The Court set aside the dismissal of the employer's complaint and remanded the cause to the National Labor Relations Board for further proceedings.

The Board filed a petition for certiorari in this Court July 30, 1952. Certiorari was granted October 13, 1952 and argument assigned immediately following *American Newspaper Publishers Association v. N. L. R. B.*, Docket No. 53, another case raising issues under Section 8(b) (6).

SUMMARY OF ARGUMENT.

The facts in this case are that the local union excluded traveling name bands from the employer's theatre in an effort to exact payment for a local union orchestra which the employer did not want or need and which was indeed a detriment to the operation of the employer's theatre. Section 8 (b) (6) of the National Labor Relations Act expressly forbids attempts to cause an employer to make payments in the nature of an exaction for services which are not to be performed. A union cannot evade this provision by attempting to exact payment for the performance of acts which are neither services nor incidental to services and which the employer does not want, does not need and is not even willing to accept. This case is funda-

mentally different from the companion case with which it has been docketed in this Court, *American Newspaper Publishers Association v. N. L. R. B.*, Docket No. 53. It is clear that here the union has violated Section 8(b)(6) and that the normal operation of collective bargaining is in no way prejudiced by such a holding.

ARGUMENT.

This is the first case arising under the anti-featherbedding provision of the Taft-Hartley Act to reach this Court. Unless it is affirmed, it will be the last.

It is quite clear, as will be developed in this brief, that no union will be so inept as to allow itself to stumble over Section 8 (b) (6) as that Section has been interpreted by the Board in the present case. It will never be beyond the ingenuity of the union bargaining representative to recite some act of omission or commission for which payments will be demanded even though the act is not wanted by the employer, is not necessary, is of no service and is in fact a hindrance to him.

Section 8 (b) (6) of the National Labor Relations Act reads:

> "It shall be an unfair labor practice for a labor organization or its agents
>
> * * *
>
> "to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed." (61 Stat. 140; 29 U. S. C. § 158 (b) (6).)

How shall these words be interpreted and applied to the circumstances of this case?

The Board and the union offer us two unpalatable alternatives. In their view we must attribute to the Con-

gress of the United States either an intention to enact an ineffective gesture or, on the other hand, a want of the minimum drafting skill required to translate policy into statute. We shall examine these alternatives in turn.

A. LEGISLATIVE POLICY OF SECTION 8(b)(6).

It is of basic importance to keep in the foreground the general policy sought to be furthered by Congress in the enactment of this Section. This policy may be simply stated.

The abuses and the economic absurdities of union make-work and featherbedding devices have been vigorously condemned by the public, by economists, by employers and often by enlightened unions. Spurred on by public opinion increasingly critical of such practices on the part of the unions, Congress in 1947 included within the list of unfair labor practices on the part of unions the anti-featherbedding provision, Section 8 (b) (6).

The Bill enacted first by the House of Representatives went quite far. So flagrant had been the featherbedding abuses of the American Federation of Musicians in radio broadcasting that Congress had already passed in 1946 the Lea Act, or Anti-Petrillo Act, imposing criminal penalties upon almost every variety of make-work practice in that field. (60 Stat. 89; 47 U. S. C. § 506.) The original Hartley Bill, H. R. 3020, 80th Congress, First Session, included in Section 2 (17) and Section 12 many of the operative provisions of the Lea Act and extended these prohibitions beyond the broadcasting industry to all areas of economic activity. And significantly the featherbedding examples stressed in the House in the debate on these provisions of the Hartley Bill were the stand-by orchestra practices of the American Federation of Musicians.

For reasons explained by Senator Taft, Congress did not ultimately enact in the Taft-Hartley Act a statutory provision treating featherbedding problems in their entirety. Speaking with regard to Section 8 (b) (6) in the form in which it was ultimately passed, Senator Taft explained:

> "Section 8 (b) (6) of the conference agreement covers a matter with which the House bill dealt extensively under the topic of featherbedding practices. * * * While the Senate conferees were in sympathy with the objectives of this portion of the House bill, it seemed to them that it was almost impossible for courts to determine the exact number of men required in hundreds of industries and all kinds of functions. The provisions in the Lea Act from which the House language was taken are now awaiting determination by the Supreme Court, partly because of the problem arising from the term 'in excess of the number of employees reasonably required.' Therefore, the conferees were of the opinion that general legislation on the subject of featherbedding was not warranted at least until the joint study committee proposed by this bill could give full consideration to the matter." (Appendix A, pp. III, IV.)*

and again:

> "We thought that probably we had better wait and see what happened, in any event, even though we are in favor of prohibiting all feather-bedding practices." (Appendix A, p. III.)

But the dilution of the stringent House measure did not reflect a lapse of Congressional interest in the abuses

---

* For the convenience of the Court we have included as Appendix A to this brief a legislative history of Section 8 (b) (6), containing a complete collection of all references made to the provision in its final form. Legislative statements quoted in the main body of this brief may be found in their full context in this Appendix at the page cited.

of the American Federation of Musicians. The examples given on the floor illustrating the purpose and operation of the present Section 8 (b) (6), continued to be taken from the practices of this union. For example, Senator Taft says respecting the present Section 8 (b) (6):

> "It is intended to make it an unfair labor practice for a man to say, 'You must have 10 musicians, and if you insist that there is room for only 6, you must pay for the other 4 anyway.'" (Appendix A, p. VI.)

And Senator Ball, in colloquy on the floor, stated:

> "* * * it [Section 8 (b) (6)] applied only to situations, for instance, where the Musicians' Federation forces an employer to hire one orchestra and then to pay for another stand-by orchestra, which does not work at all." (Appendix A, p. XI.)

No other union and no other union practice even shared the limelight.

The purpose of Section 8 (b) (6) was economic. The economic purpose of the provision was to restrict certain undesirable economic activities on the part of labor unions. The restrictive economic purpose of the provision, to judge from the statements of the draftsmen, was most particularly to prevent certain undesirable economic activities of the American Federation of Musicians. It is quite impossible to ascribe any other general objective to the Congressional enactment of Section 8 (b) (6).

It is earnestly submitted that no germ of a practical policy is detectable in the interpretation put upon this Section by the Board and the union. No remedial economic consequences flow from it; no economic or social abuse is halted. We can safely challenge the Board and the union to suggest any meaningful content left to this provision under their interpretation or to offer any useful policy to be subserved by a statute deliberately enacting that interpretation into law.

On the legislative record it cannot be seriously asserted that Congress had no substantial economic objective in mind in enacting Section 8 (b) (6). We therefore turn our attention to the second alternative offered by the Board and the union—that, whatever its underlying policy, Section 8 (b) (6) is so inadequately drafted that is commands only token compliance.

B. STATUTORY ANALYSIS.

Great confusion has attended discussion of the phraseology of Section 8 (b) (6). We think that the terminology will bear close analysis and application to the facts of this case.

1. "In the Nature of an Exaction."

> "It shall be an unfair labor practice for a labor organization or its agents * * * to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in **the nature of an exaction**, for services which are not performed or not to be performed."

An initial point of difficulty is the emphasized phrase "in the nature of an exaction." It is apparently the position of the Board and of the union that in some way the use of this term means that the proscriptions of Section 8 (b) (6) are not effective unless the union exerts some unusual or exceptional or extreme form of economic coercion. It is then contended that no such coercion is shown by the present record. The position is sound neither in analysis nor application.

a. *The Statute.*

(1) A moment's reflection will demonstrate that the union's interpretation cannot be correct. Congress and the courts have frequently concerned themselves with the

problem of the permissible methods by which both employer and employee may pursue their objectives. Violence on the part of picketers and coercion on the part of employers have both quite properly been forbidden. But it is absurd to suggest that any such preoccupation with method was in the mind of Congress in its enactment of Section 8 (b) (6). It was a certain union objective which was to be outlawed, not a particular method of obtaining it. The legislative record shows this clearly.

No member of either house suggests that the objectionable feature of featherbedding practices is that they are enforced by the union through coercive tactics. No objection is raised by any opponent of the bill on the ground that the statute would prevent unions from employing bargaining *sanctions* theretofore legal. The controversy turns entirely upon the *objectives* for which even normal union bargaining tactics should be forbidden.

The legislative history of the provision supports and explains the use of the language and the reason for the choice of phraseology. There was undeniably a fear on the part of the draftsmen that Section 8 (b) (6) might be interpreted too broadly and might be construed to remove from the area of collective bargaining such fringe benefits as paid vacations and paid rest periods. And it was exactly to allay this fear that the language "in the nature of an exaction" was included. Senator Taft, in an interchange with Senator Pepper, explains the point clearly.

"* * *

Mr. Pepper: Would it be an unfair labor practice for a group of women working in a textile mill to insist upon the employer giving them a rest period of 15 minutes each morning, and to be paid for that work period when they were not actually working?

Mr. Taft: No; I do not think that is in the nature of an exaction.

Mr. Pepper: Suppose they said they were going to strike if they did not get the rest period, and they therefore forced the employer to give it to them as a condition of continuing to work.

Mr. Taft: They are paid for the work they do.

Mr. Pepper: But they are paid for the 15 minutes when they are resting and not working.

Mr. Taft: In my opinion that would not be a violation of this section.

Mr. Pepper: There are contracts in force between a great many unions and employers under which, if a worker reports for work in the morning at the appointed time and finds that he is not going to be required to work that day, the employer must pay him for the day's work. Would insistence by a labor union upon payment of a day's pay to a worker who reported for work in the morning, when the employer gave him no work to do when he got there, be considered an exaction?

Mr. Taft: No: I do not think that is in the nature of an exaction. He is paid for coming to work at the request of the employer. It is not in the nature of an exaction." (Appendix A, p. v.)

None of these union practices represented an "exaction," regardless of the economic pressure brought to bear by the union. None was a violation because all represented efforts toward justifiable union *objectives*.

It is not suggested that there is no element of pressure involved in the phrase "in the nature of an exaction." There is, of course. The point is that there is no *unusual* aspect of pressure implied by the term "in the nature of an exaction." The pressure referred to is the usual bargaining pressure of the conference table—the normal process of collective bargaining powered by the lever of economic bargaining potential on both sides. The essential feature in the unfair labor practice prohibited by Section 8 (b) (6) is that these economic pressures, otherwise

legitimately used in collective bargaining, are coupled with unjustifiable objectives. It is the combination which constitutes an "exaction."

(2) The grammar of the section conforms to this interpretation.

Section 8 (b) (6) by its terms says that it shall be an unfair labor practice for a labor union *"to cause or attempt to cause"* an employer to pay money "in the nature of an exaction" for services which are not to be performed. The statute does *not* say that it shall be an unfair labor practice for a labor union to *exact or attempt to exact* such a payment. As a matter of syntax the phrase "in the nature of an exaction" refers to the payment of the money. It is not English grammar to say that one *does* something *in the nature of* something else. The phrase "in the nature of" is used to modify nouns, not verbs. As, for example, it is English to say "A legislature sometimes imposes a tax in the nature of a penalty." But one does not say "A legislature sometimes taxes in the nature of a penalty."

The grammatical difference is material here. The verb in Section 8(b)(6) is "cause or attempt to cause," not "exact." And the phrase "in the nature of an exaction" is not adverbial. It does not describe a prohibited method or manner of obtaining an objective but rather the prohibited objective itself.

(3) Nor did Congress misuse the term "exaction" in its drafting of this phrase.

Webster's Unabridged Dictionary gives as its example of the use of the verb "to exact": "to wrest, as a fee or reward *when none is due.*" And the example given under the word "exaction" is: "the exaction of *tribute.*" "Exaction" is also defined as a "fee, reward, or contribution, demanded or levied *with severity or injustice.*" *Crabb's*

English Synonyms, Revised Edition, offers as its example of the correct usage of the word "exact"

> "The collector of the revenue exacts when he gets from the people *more than he is authorized to take:*" Page 319.

Again this is not to suggest that there is not an element of pressure contained within the word "exaction." The significant fact is that correctly used the term denotes a payment which is *unjustified, undue* and *unearned.*

(4) The preceding three subparagraphs have considered the legislative purpose, the grammatical use, and the diction of the phrase "in the nature of an exaction." The results are consistent and cumulative. This skilled coherence belies the union's suggestion that Section 8(b)(6) is not sufficiently carefully drafted to achieve its purpose.

There is nothing in Section 8(b)(6) which requires the union to exert any unusual or extraordinary pressures beyond those of ordinary collective bargaining. Conversely, it is no answer to a charge of violation of Section 8(b)(6) for the union to argue that it did nothing to "coerce" the employer. It is enough, as the statute expressly says, for the union "to cause or attempt to cause" the employer to make the payment.

b. *The Record.*

(1) The critical question, under this interpretation of the meaning of the term "in the nature of an exaction," then, is to determine what the Union's objective was and whether that objective was a justifiable one. The question raised by the phrase "in the nature of an exaction" is whether the objective sought by the Union was one intended to be prohibited by the Section. This question is closely related to the analysis and application of the statu-

tory language "services which are not performed or not to be performed" and discussion of the point is reserved to that portion of this Brief. (See pages 22-28, *infra.*)

(2) It is not crucial to the employer's position, however, under the circumstances of the present case that the Court recognize as correct the interpretation here offered for the phrase "in the nature of an exaction." Under the particular record at hand even the interpretation urged by the union may be accepted and its requirements satisfied. If it should be thought, we think erroneously, that the use of the term "in the nature of an exaction" introduces a requirement of some special sort of coercive pressure on the part of the union, it is clear under the record at hand that in fact such coercive pressure was brought to bear. This must be true unless one should wish to argue that it is not coercion for the union to withhold from the Palace Theatre the services of traveling name bands for two years.

The facts are that it was at all times within the power of the local union to permit or to forbid traveling bands to play at the Palace. Under the provisions of the Constitution of the American Federation of Musicians, entrance of a traveling band into the jurisdiction of a local union was at all times within the discretion of the local union, as the union's Mr. Light testified. The recitations in the telegram and letter sent from the president of the Federation specifically recite that Local No. 24 in Akron had continued to advise the national headquarters to keep out traveling bands. The somewhat forgetful Mr. Teagle did recall notifying Acuff's manager that his demands had not been met, that there was no agreement and that the show should not appear. What more coercion would be necessary for a union to exert, if this is not sufficient, it is difficult to imagine. Only the point of a gun could be much more persuasive.

But it is our position that there is no necessity to fall back upon the certainty of the facts in this particular case. It is a wider principle for which we are arguing here and one which we think, under the history and wording of the statute, is undeniably sound. The inclusion of the phrase "in the nature of an exaction" suggests no necessity for a special showing of economic sanctions.

2. "To cause or attempt to cause."

> "It shall be an unfair labor practice for a labor organization or its agents * * * **to cause or attempt to cause** an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed."

The emphasized words "to cause or attempt to cause" must also be considered in the context of the present case. Failing to introduce the irrelevant and extrinsic factors of extraordinary coercion through the avenue of the phrase "in the nature of an exaction," the union has, in the alternative, implied that the phrase "cause or attempt to cause" must be construed as containing in it a requirement for an extraordinary coercive sanction of some sort.

This position is without support.

a. *The Statute.*

(1) The only parallel term existing in the National Labor Relations Act appears in Section 8(b)(2) forbidding a union "to cause or attempt to cause" an employee's discriminatory discharge. Here it has been the position of the Board that "cause or attempt to cause" means what it says and that a union may be guilty of an unfair labor practice in causing or attempting to cause an employer to discriminate against an employee with-

out garrotting the employer, without blackmailing him, and without threatening him. A single letter from the union requesting and leading to an employee's dismissal has been held a sufficient "attempt to cause." *

No reason has been suggested why the same phrase used twice in the same way in the same section of the same statute should be interpreted in two different ways.

(2) It is notable that insistence at a bargaining table upon assent to an unfair labor practice constitutes a failure to bargain and is in itself an unfair labor practice under Section 8(b)(3).†

(3) "To cause or attempt to cause" is simple everyday language. Its words do not suggest any element of extraordinary coercion. Precisely what degree of activity would be necessary on the part of the union to meet the requirements of the phrase we do not suggest, but wherever such a line might be, it is safe to say that the circumstances here are well within it.

b. *The Record.*

It would be a disquieting shock to the members of Local No. 24 to learn that their secretary and treasurer, Mr. Teagle, had not been for the past two years causing or

---

* *New York Shipbuilding Corporation*, 89 NLRB 1446 (1950); *National Union of Marine Cooks and Stewards*, 2 CCH Labor Law Reporter, ¶ 10,527 (1950).

† "But what the Act does not permit is the insistence, as a condition precedent to entering into a collective bargaining agreement, that the other party to the negotiations agree to a provision or take some action which is unlawful or inconsistent with the basic policy of the Act. Compliance with the Act's requirement of collective bargaining cannot be made dependent upon the acceptance of provisions in the agreement which, by their terms or in their effectuation, are repugnant to the Act's specific language or basic policy." *National Maritime Union of America*, 78 NLRB 971 (1948), enf. gr. 175 F. 2d 686 (C. A. 2 1949), cert. den. 338 U. S. 954 (1950), rhg. den. 339 U. S. 926 (1950).

attempting to cause the Palace Theatre to make payments to the union members. To state the point is to demonstrate its falsity. Mr. Teagle and Local No. 24 excluded all name bands from the Palace for over two years to enforce their insistence upon payments to local musicians. They used every bit of bargaining power in their possession for that period.

These actions were most certainly aimed toward causing or attempting to cause the payments demanded, as any layman, unbeset by lawyers' subtleties, would answer at once.

3. "Services which are not performed or not to be performed."

> "It shall be an unfair labor practice for a labor organization or its agents—to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for **services which are not performed or not to be performed.**"

We are thus brought squarely to the issue of the meaning of the last phrase in Section 8 (b) (6), "services which are not performed or not to be performed." It is upon this wording that the greatest controversy has centered in the present case.

The problem may be best understood by stating the union's position first.

It is the argument of the union that "services" does not mean services, but means any form of activity, or perhaps the omission of some form of activity.

It is the position of the union that Congress meant to see to it through the enactment of this statute that no labor organization should receive payments unless it does some act or perhaps omits to do some act, regardless of its utility, benefit or desirability.

It is the union's position that it cannot be held guilty of an unfair labor practice so long as it is offering in exchange for the payments to do something (or not to do something) whatever the something may be.

It is the position of the union that an employer can be compelled to pay wages for any act or activity which the union demands to perform.

It does not reduce the union's case to absurdity, but is only a fair statement of its position to say that the interpretation they urge permits a union to compel an employer to pay wages to a local orchestra for the "service" of playing in a sound-proof, inaccessible room.

The union is not arguing here that under reasonable circumstances there may be payments for non-performance where the non-performance is ancillary to regular employment, as, for example, paid vacations or rest periods. It is rather the position of the union that the services not performed need not be ancillary to anything, nor need there be any relationship between the exorbitance of the payment demanded and the activity performed. It is inherent in the union's position that there would also be no violation of Section 8(b)(6) if it were to compel an employer to pay local musicians for striking one resounding chord as the curtain rises, giving an heroic trumpet toot at 2:30 A. M. every Tuesday morning or tinkling a triangle every afternoon just at tea time.

Utility, says the union, is no criterion. We are adjured not to allow economic or social circumstances to impinge upon judgment in this case, as though we were not dealing with a statute pre-eminently aimed toward the solution of economic and social problems. It is a measure of the strength of the union's position that they repeatedly press us to ignore these factors. We are being solemnly assured that Congress was not interested in protection of

the public against economic and social abuses and wastes, but was primarily interested in seeing to it that the members of the union obtain more exercise.

The stand-by orchestra is dead.

Long live the walk-by orchestra.

Is this interpretation inevitable? Must it be accepted despite its economic futility? We think not.

a. *The Statute.*

(1) The error of the union's position on the point springs from a single basic source. If unearned payments are forbidden to be made for inaction, three curatives are available: the payments may be stopped while the inaction continues; the payments may be continued while constructive labor is substituted for inaction; or, the payments may be continued while inaction is superseded by a flurry of undirected, purposeless or detrimental activity. It is essentially our position that Congress in outlawing payments for "services not to be performed" meant that payments should not be made except when earned by or incidental to constructive labor done. Equally essentially it is the view of the union, and apparently the Board, that Congress intended that the statute should be read in the only way which makes it ridiculous—intended that the payments should continue but that in exchange the union members paid should stamp their feet or blow their horns or play silently or do whatever other useless or harmful acts of commission or omission might appeal to them.

It is most earnestly pressed upon this Court that this kind of legal interpretation can do little to cast honor upon the law or its administrators. We think our position has the strength of common sense. We think our position conforms to the best established rule of statutory interpretation—that when alternative interpretations are possible, that one should be adopted which yields a practical and

sensible result rather than one which deprives the statute of all sense and meaning. *Haggar Co. v. Helvering*, 308 U. S. 389, 394 (1940).

(2) We do not suggest that the language of this clause is clear beyond the need for explanation. But we do assert, most vigorously that the interpretation for which we contend conforms to the legislative purpose of its enactors and places no strain upon the language used by its draftsmen.

The key word is the word "services." *Webster's Unabridged Dictionary* offers as the primary definition of the word "service" in this context:

> "Performance of labor for the benefit of another, or at another's, command * * *";

Dozens of other definitions are given in Webster. Many of them offer direct support for the position that "services" can only be performed for another's benefit or use. Attention is called, without quotation, to definitions 4, 5, 11, 16, 17, 18, 20 and 22. Some of the other definitions are clearly unrelated to the present problem, but no definition supports the interpretation urged by the union.

There is simply no answer to this point. The union can sustain its interpretation only by pretending the word "services" is not in the statute. The normal usage of the word "services," the usage clearly demonstrated by the general legislative desire of Congress to abolish feather bedding practices compelling payment where the employer gets no benefit and the usage consistently reflected in a score of definitions in *Webster's Unabridged Dictionary* make the conclusion irresistible that the word "services" as used in Section 8(b)(6) is restricted to acts or actions performed for the benefit of the employer.

Again, any layman would say that wages are paid only for services in this sense. No reason is offered why the statutory language should be construed otherwise.

(3) It is in connection with this interpretation of "services which are not performed or not to be performed" that the earlier considered phrase "in the nature of an exaction" must be read.

The union has suggested as support for its interpretation of "services" the asserted risk that any other reading would outlaw such recognized labor benefits as paid vacations and paid rest periods. It is questionable whether, as a logical matter, this contention upholds the union's interpretation, but in any event, the supposed dilemma is one of the union's own creation.

We are again presented with an example of very careful drafting in which the phrases must be considered together in order to determine their relationship and meaning as a whole. As we have explained in detail earlier in this brief, the function of the words "in a nature of an exaction" was not to outlaw particular coercive techniques for obtaining union objectives but to forbid the use of ordinary union tactics for the achievement of certain unjustified objectives. The importance and necessity of the phrase becomes clear when considered together with "services which are not performed or not to be performed." If it were not for the "nature of an exaction" language, there might be certain merit to the union's position that under the literal language of Section 8(b)(6), paid vacations and paid rest periods would be forbidden. But it is exactly this result which has been carefully avoided by the inclusion of the language "in the nature of an exaction."

The point is made quite clear in the colloquy between Senators Pepper and Taft, quoted *supra*, pages 15-16. (See Appendix A, page v.) And in a supplementary analysis offered by Senator Taft, the point appears again.

"A number of Senators have contended that this means that union requests for payment to employees of wages for lunch and rest periods or for waiting periods when machinery is being repaired will be illegal. It has also been stated that it would be a breach of this section for employees who are asked to report for work so as to be available as a relief squad in the event of emergency or need, to demand any money for their time. Of course this section does not affect such industrial practices, *as such activities are done at an employer's request and for valuable consideration incident to the employment itself.*" (Appendix A, p. x.)

The payments are not "in the nature of an exaction" if they are incidental to bona fide employment, and there is, therefore, no violation of Section 8(b)(6) in vacation payments even though they are, in a literal sense, made for services not performed.

Thus the goblin raised by the union is seen, like most goblins, to be non-existent. And, further, disproof of the union position respecting the scope of the "services" language further demonstrates the incorrectness of their position that the word "exaction" was included for the purpose of making extraordinary coercion a necessary element in the unfair labor practice. The phrase was included to *limit* the sweep of the phrase "services which are not performed or not to be performed."

By misconstruing the first phrase, the union has invented an argument for misconstruing the second.

Statutory language must sometimes be strained in order to carry out the underlying legislative policy. It is novel to hear it argued that statutory language should be doubly distorted in order to subvert the underlying policy.

(4) We have now examined the legislative statements of purpose made respecting the phrase "services

which are not performed or not to be performed." We have closely considered the words used in the phrase. We have scrutinized the relationship of the phrase to the balance of the section. It seems to us that there can be only one conclusion.

Taken in conjunction with the words "in the nature of an exaction," the phrase "services which are not performed or not to be performed" limits payments to (1) payments made for labor or work done for the benefit of the employer, or (2) payments made incidentally to labor or work done for the benefit of the employer, as for such fringe benefits as paid vacations or call-in pay.

b. *The Record.*

Each component phrase of Section 8(b)(6) has now been reviewed. With their individual meanings and meaning as a whole in mind it is possible to sum up their application to the circumstances of the present record.

(1) Applying what we consider to be the correct interpretation of "services which are not performed or not to be performed" to the facts of the present case, it is clear that the actions of the union fall squarely within it. The record shows that it was the union's insistent demand to play intermissions and overtures at the performances of the traveling name bands at the Palace. It is equally clear, and the union does not seriously contest, that the employer had no use for such intermissions or overtures, that they had been of no service to him, that they had no entertainment value, that they would not help to draw an audience and that they represented in fact a continuing interference in the operation of the theatre. It is clear that there were no "services" to be performed.

It has been shown that the union was attempting to cause the employer to make payments. See *supra*, pages

20-21. And if the statute requires an element of unusual coercion, as we think it clearly does not, that factor too is revealed by the present record. See *supra;* pages 18-19.

And the payments were in the nature of an exaction since they were unearned, were not for services to be performed and were not ancillary to bona fide employment.

In sum, the union's actions constituted explicit violations of Section 8(b)(6).

(2) Again, however, in view of the extreme facts shown by the record it is not necessary to the affirmance of this particular case that the correct interpretation of "services" be assumed. Even accepting the union's interpretation, we contend that it has violated Section 8(b)(6).

Even if it is assumed for some odd and unsuggested reason that the word "services" in Section 8(b)(6) means only the commission or omission of some useless or harmful act, we think the record in this case makes it clear that the union never intended that the acts which they offered would in fact be performed. We challenge the union's assertion that it genuinely contemplated the ultimate playing of these intermissions and overtures.

We do not question the bona fides of the union's offer in the sense that we think they would not have played these intermissions and overtures if requested. As the Trial Examiner remarked: "[I]t may be assumed that in all comparable situations, the stand-by orchestra is willing enough to give actual performances; musicians, being human, had no doubt rather play than not to play." (R. 361.) But we challenge Mr. Teagle's repeated statement that the union was "only seeking employment for its members" and we challenge the union's statement that it fully

intended and anticipated that these intermissions and overtures would ever be played.

The purpose of the union's argument here is, we suppose, not only to avoid the statute but to place us in the position of arguing that a union may not seek employment for its members. We shall not, of course, permit such a ridiculous position to be imposed upon us. But the question is loaded. The question is whether it was "employment" which the members of the union were seeking. The record shows that it was not.

If a lawyer were seeking employment, would he insist of a prospective client that he be hired only at such times as another lawyer was hired? Does the insurance salesman only seek to sell his insurance to one who he knows to be buying from another insurance salesman? Does not one normally seek employment where his services are needed and wanted and will be paid for in exchange for the benefit which they provide for the employer? Would anyone recommend to his friend that the best way to be employed for a job is to wait until another has been hired to perform it? Would anyone recommend to himself that the way to seek employment is to demand that job and only that job which has already been filled?

These questions are rhetorical. But it is not we who have raised them. It is the union which apparently holds this conception of the word "employment." The union in this case did not ask for employment. It asked that its musicians be paid to do something simultaneously with its performance by others.

Local stand-by orchestras had been paid off by the Palace Theatre for many years. They had always been available to play overtures and intermissions. It is represented by the union that they were at all times available for this purpose. They would presumably have appreciated

the opportunity to perform after dozens of rehearsals without actual performance. But they were almost never used.

It is not conceivable that with this kind of a background of experience, the union could seriously have thought that in the future the Palace Theater would find the use of musicians for that purpose a popular and acceptable practice. Would not the union's position be considerably more persuasive if there had ever been a record of the usefulness of such players? Or would it not be more supportable, if in the absence of such a record, the union had attempted to negotiate the employment of its people at times other than those at which name bands were simultaneously employed?

It is true that in later stages of the negotiations, the union permitted discussion of an arrangement under which local musicians would play for pick-up vaudeville acts, one such show being presented for each name band hired. The union, however, never agreed to such an arrangement, was not primarily interested in it, exerted the strongest economic pressure at its command for over a year before being reduced to discussing it at all and, significantly, still geared its demands to the hiring of the outside name bands, insisting upon a fixed ratio between the vaudeville shows and the name band engagements, regardless of the availability of the pick-up acts.

The fact is that this situation comes squarely within the example given by Senator Taft:

> "[Section 8(b)(6)] is intended to make it an unfair labor practice for a man to say, 'You must have 10 musicians, and if you insist that there is room for only 6, you must pay for the other 4 anyway.'" (Appendix A, p. VI.)

The Palace Theatre had hired, to continue the figure, six union musicians in the persons of the traveling name band. The local union has insisted upon the hiring of four more.

We do not think the union genuinely contemplated that it would play the overtures and intermissions. The Trial Examiner agreed with us in their findings upon this point. (R. 362, 363.) Under the National Labor Relations Act, as amended by the Labor Management Relations Act of 1947, the scope of judicial review has been expanded and, as this Court has already held, the evidence is to be reviewed upon the entire record.* If this is done, we submit that even from the dead pages of the record, the real anticipations of the union will show forth clearly. The Trial Examiner, before whom the witnesses appeared, was convinced, apparently mainly from the testimony of the reluctant Mr. Teagle, that the union anticipated that the payments would be made quite independently of whether the intermissions and overtures were ever performed. The Court of Appeals agreed. We think they were right and we believe that the record taken as a whole supports this conclusion.

Under this view, then, too, even under the union's theory that useless acts may be "services," the union is seen to have been guilty of an unfair labor practice under Section 8(b)(6). It attempted to cause the payments. The "services" were not to be performed and everyone knew they were not to be performed. The payments sought were in the nature of an exaction since they were for "services" which were not to be performed, which were unjustified and which were not ancillary to true employment. Again, the explicit elements of a violation of Section 8(b)(6) are present.

Universal Camera Corp. v. NLRB, 340 U. S. 474 (1951); *NLRB v. Pittsburgh Steamship Co.*, 340 U. S. 498 (1951).

(3) But we may go even further.

Suppose we were to concede not one point but two which we think clearly untrue: first, that a useless or harmful act is a "service"; and second, that the union fully intended, in fact would insist upon, performing the "services" of playing the intermissions and overtures. Is there not still offered by this case a violation of Section 8(b)(6)? We think so, for we do not believe that technical and formal compliance is the primary interest of the law.

It is a duty and function of the courts to guard against fraud upon the law. Anglo-American jurisprudence knows countless examples where token compliances with formal requirements have not prevented discerning courts from perceiving the substance underlying the form.

In the construction of a tax statute, this Court recently stated that

> "To permit the true nature of a transaction to be disguised by mere formalisms, which exist solely to alter tax liabilities, would seriously impair the effective administration of the tax policies of Congress." *Commissioner v. Court Holding Co.*, 324 U. S. 331, 334 (1945).

The principle is as applicable in labor law as in revenue law.

We do not suggest that Section 8(b)(6) imposes upon the courts the task of determining whether a given wage demand is reasonably related to the services to be performed. But, at some point unreasonableness merges into preposterousness. It presumably would be of some service to the Managing Director of the Palace Theatre to have his shoes shined once a week and his office window opened in the morning. But we do not believe that any court would permit the Musicians' Union under Section 8(b)(6) to compel an employer to pay full wages to a nine-man or-

chestra in exchange for their polishing the manager's shoes or opening his window once a month. It would be apparent, would it not, that there was no real relationship between the wages paid and the services performed, that no bona fide employment was involved and that the empty gesture of an insignificant service was the most thinly disguised evasion of the spirit and the force of Section 8(b)(6)?

The instance put must not be dismissed as a rhetorical reduction to absurdity or as an exaggeration. It is this very record which produces the absurdity and exaggeration. In the hypothetical case just given the union was at least performing *some* service of use and benefit to the employer. The employer, if he is compelled to pay in any event, would prefer that his shoes be shined and his window opened, or that some service, however insignificant, be performed to his benefit rather than have his business operations disrupted by the interjection of such acts as the playing by a local orchestra of intermissions during the performance of a nationally known name band.

And if the union should, in order to put itself beyond the reach of Section 8(b)(6), *insist* upon the performance of these unwanted disservices, are we not presented with a pretty bit of statutory construction? Congress passes a statute calculated to protect employers against some forms of the featherbedding abuse. By a remarkable reading of this statute, the employer is not only required to continue paying, but he is deprived of his former right at least to buy his peace.

There must be something wrong with such an exercise in statutory analysis.

Thus again, even upon two assumptions taken most favorably toward the union, erroneous though they be, substantive violation of Section 8(b)(6) is still revealed

by the present record. The element of attempting to cause the payments remains as before. And the token offer to perform an insignificant and unwanted act, even assuming the act to be a service and to be in fact performed, taken together with a demand for full wages for nine men and the insistence upon performance together with the name band, combine to make the apparent compliance with the statute a patent evasion. This Court has hitherto shown no patience with such frauds upon statutes. It should not do so here.

C. ANALYSIS OF AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION v. NLRB, 193 F. 2d 782 (C. A. 7, 1952).

American Newspaper Publishers Association v. NLRB, 193 F. 2d 782 (C. A. 7, 1952) is docketed for argument together with the present case. It was the position of ANPA in its application to this Court for certiorari that the decision of the Court of Appeals for the Seventh Circuit in that case is in conflict with the decision of the Court of Appeals for the Sixth Circuit in the present case. In common interest with ANPA on this point, the National Labor Relations Board similarly asserted the existence of this conflict in its application for certiorari in the present case and, acting consistently, did not contest the granting of certiorari in the *ANPA* case.

For judicial decisions to be in conflict, it is necessary that they be delivered upon substantially identical facts raising substantially identical issues and that these issues be resolved inconsistently by the courts. Neither of these components is present here. The *ANPA* case is basically different in its circumstances and issues from the present case. And both courts expressly recognized the factors which separate them. The two decisions are not inconsistent with each other but are independent of each other.

The facts in the *ANPA* case were that regularly employed newspaper compositors, members of the International Typographical Union, insisted upon payments for "setting bogus" advertisements which, after being proofread and corrected, were then destroyed without being used, the actual printing being done with matrices provided by the advertiser. The Court of Appeals for the Seventh Circuit found there was no violation of Section 8(b)(6) in this practice.

The reason is precisely that explained in detail in this brief at pages 26-28. Time spent in setting "bogus" represented only 5 per cent of the typographers' composition time; payment for the "bogus" was incidental to payment for bona fide services rendered by the union. The typographers still provided services for the employer during 95 per cent of their composition time. This "bogus" was *incidental* to the real work for which the employees were hired and paid. The employee was "not hired merely to set 'bogus,' but hired to do composition work which the employer required." 193 Fed. 2d 782, 802.

The contrast of this situation with the present one is apparent and the difference lies in two most important respects. In the first place, in the present case the members of the Union were being hired to do nothing "which the employer required." To the contrary, that which the Union members assertedly desired to do was a positive hindrance. The demand for these payments was incidental to nothing. Thus, even though actually performed, the acts of the musicians here would not have been services or incidental to services.

In the second place, the idle setting of "bogus" in *ANPA* case was at least performed. While no economic advantage flowed from this it does differentiate in the *ANPA*

situation from that in the record at Bar. For here, as the trial examiner found, and the Court of Appeals concluded, the only reasonable inference from the record is that the Union would not, in fact, have gone through the meaningless and distracting musical motions upon which it was assertedly insisting.

We are not alone in detecting the crucial factor involved in these two cases nor is our argument one based only upon our interpretation of the facts in the two records. Both courts isolated and stressed the critical difference.

The reasons given by the court for its decision in the *ANPA* case are particularly clear. Reviewing Section 8(b)(6), the Court first noted the material already set forth in this brief at pages 11-12 respecting the original Hartley Bill and the broad anti-featherbedding provision later curtailed by the Conference Committee. The court added:

> "Senator Taft * * * clearly indicated that in his opinion the only practice covered by § 8(b)(6) was the practice of demanding money where no *work* had been done. He explained further, however, that the section did not even cover all cases where employees were paid for time during which they did not work, such as rest periods, time for lunch and vacation periods; that such periods were merely incidental to the work for which the employee was hired and paid * * *" 193 F. 2d 782, 801.

And, after quoting the same statement by Senator Taft quoted on page 13 of this brief, the Court continued:

> "Senator Ball in speaking in favor of this section also said that it applied to a situation where an employer is required to pay for a stand-by orchestra, 'which does no work at all.' (93 Cong. Rec. 7683.)

> In the instant case the pay for 'setting bogus' was only for the time the employee actually worked in setting the 'bogus,' amounting to approximately five per cent of his total working time. *He was a regular employee, not hired merely to set 'bogus,' but hired to do composition work which the employer required.* * * *" (Emphasis added.) *Id.* at 802.

On this basis the Court of Appeals for the Seventh Circuit concluded that the Typographical Union was not guilty of a violation of Section 8 (b) (6).

The Court of Appeals for the Sixth Circuit similarly recognized the critical significance of the fact that the Union in the present case could not claim that in any degree its unwanted acts were incidental to bona fide employment. This court, too, discusses the legislative background of Section 8 (b) (6) and makes special reference to

> "Senator Taft's effort to convince his colleagues that the section does not reach conventional *stand-by practices* normally *incident to services required by an employer from his employees in the usual course of his business* and of benefit to him such as rest periods, lunch periods, relief duty in case of emergency or need, inactive periods during time of machinery repair, *and other non-work presence of regular employees upon the employer's premises.*" 196 F. 2d 61, 63. (Emphasis added.)

And perhaps of most significance is the fact that, like the Court of Appeals for the Seventh Circuit, the Court of Appeals for the Sixth Circuit chose as its example of the kind of practice against which Section 8 (b) (6) was directed the stand-by orchestra device of the American Federation of Musicians.

"The dominant purpose of § 8 (b) (6), however, is illuminated by Senator Taft in 93 Cong. Rec. 6446 where he said of it:

"'* * * To make it an unfair labor practice for a man to say you must have 10 musicians and if you insist that there is room for only 6 you must pay the other 4 anyway, that is in the nature of an exaction from the employer for services which he does not want, does not need, and is not even willing to accept.' The analogy of the example to the presently charged labor practice falls barely short of perfection, and reaches it if we substitute 'need' for 'room.'" *Id.* at 63.

Thus both Courts of Appeals recognized the critical distinguishing factor of bona fide employment, and the *ANPA* case and the present case are seen to be separate and distinct raising different legal issues. They both pose problems of interpretation of Section 8 (b) (6) but they do not stand or fall together. Their separate identities must be maintained in the analysis and application of the statute.

D. COLLECTIVE BARGAINING.

Some suggestion was made in the proceeding before the Court of Appeals by the intervenor union that the interpretation of Section 8 (b) (6) advanced by the employer would undermine and imperil the entire collective bargaining process. It is the asserted fear of the union that if the courts enforce Section 8 (b) (6) as Congress has written it, they will presume to decide in the case of each employer what jobs are necessary to the operation of his business and in the case of each employee what wages may be asked.

It is difficult to see wherein the union finds cause for such alarm. Of course Congress intended no such pur-

pose. Of course we argue for no such result. And of course the courts will not so construe the statute.

Almost any legal proposition can, by the use of imaginative hypotheticals, be extended to a point of absurdity. But it is not usually thought that the need for a rule of reason, or the necessity for a practical limitation upon the excesses of logic, requires that the courts or the legislature abdicate responsibility and stand powerless to deal with critical problems.

The Court is presented in this case with two alternatives. The alternative offered by the union and the Board vitiates Section 8 (b) (6) entirely. The alternative offered by the employer gives effect to Congressional policy and meets the problem at bar. Though we cannot purport to answer future cases in advance, we think the courts may be relied upon in this field of the law as in others to meet tomorrow's case when it arises with a rule of reason. And indeed, the courts have been called upon before to determine whether a union is seeking bona fide employment. See *United States v: Local 807*, 315 U. S. 521 (1942). The collective bargaining process has continued unimpaired.

The proper choice between the alternatives offered here is clear.

E. CONCLUSION.

Section 8 (b) (6) represents a coherent and effective statutory statement of an important and ascertainable congressional policy. The National Labor Relations Board seeks to eviscerate it.

The application of this statute to some future borderline cases may, as in all fields of law, be difficult. But if this case is reversed, there will be no future borderline cases, for this record raises the prototype case—the specific union and the specific practice which inspired the statute.

Congress has legislated specifically against the stand-by orchestra. The Board should not be permitted to make it necessary for Congress to re-legislate against the walk-by orchestra.

It is respectfully submitted that the judgment of the Court below should be affirmed.

FRANK C. HEATH,
H. CHAPMAN ROSE,
Attorneys for Respondent,
1759 Union Commerce Bldg.
Cleveland 14, Ohio.

JONES, DAY, COCKLEY & REAVIS,
Of Counsel.

Dated November 10, 1952.

APPENDIX A.

Legislative History of Section 8(b)(6) Labor Management Relations Act, 1947 (61 Stat. 140; 29 U. S. C. § 158 (b)(6)).

Legislative action on the Bill which ultimately became the Labor Management Relations Act, 1947 (usually called the Taft-Hartley Act) began with the introduction by Congressman Hartley of H. R. 3020, 80th Cong. 1st Sess. As reported from Committee and passed by the House this Bill contained within it extensive and detailed provisions dealing with the subject of make work and feather-bedding practices. See H. R. 3020, 80th Congress, First Sess., Sec. 2 (17) and Sec. 12.

The original Taft Bill as passed by the Senate contained no provisions respecting this subject.

The Bill reported from the Conference Committee contained the present version of Sec. 8(b)(6). No amendments to the conference version were made on the floor of either House.

The material included here constitutes the complete record of all remarks made on the floor or statements made in reports respecting the final version of Sec. 8(b)(6). They are grouped here first by House of Congress and secondly in chronological order.

References to the Congressional Record are to the permanent bound volumes. Page references are also given to LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, published by the National Labor Relations Board, USGPO Wash., 1948, cited "History."

House of Representatives.

Excerpt from House Conference Report No. 510 on H. R. 3020, 80th Congress, First Sess., page 45, 93 Cong. Rec. 6361, 6374, June 4, 1947 (History p. 549):

"* * * It is also made an unfair labor practice for a labor organization or its agents to cause or attempt to cause an employer to pay any money or thing of value, in the nature of an exaction, for services which are not performed or not to be performed. This provision derives from the provisions of the House bill relating to 'feather-bedding' practices."

Excerpt from speech of Hon. Gerald W. Landis, respecting the amended H. R. 3020 as reported from Conference Committee, 93 Cong. Rec. 6386, June 4, 1947 (History p. 905):

"We added the following sections to the Senate Bill: * * * 'make it a violation of the law for a Union to try to compel an employer to pay its members for services not performed.' * * *"

Excerpt from House Document No. 334, 80th Congress, First Sess., Presidential Veto Message, 93 Cong. Rec. 7485, June 20, 1947 (History p. 917):

"(3) The bill presents the danger that employers and employees might be prohibited from agreeing on safety provisions, rest-period rules, and many other legitimate practices, since such practices may fall under the language defining 'feather bedding'."

Senate.

Statement of Senator Taft on the floor respecting the amended H. R. 3020 as reported from Conference, 93 Cong. Rec. 6441, June 5, 1947 (History p. 1535):

Mr. Taft:

"There is one further provision which may possibly be of interest, which was not in the Senate bill. The House had rather elaborate provisions prohibiting so-called feather-bedding practices and making them unlawful labor practices. The Senate conferees, while not approving of feather-bedding practices, felt

that it was impracticable to give to a board or a court the power to say that so many men are all right, and so many men are too many. It would require a practical application of the law by the courts in hundreds of different industries, and a determination of facts which it seemed to me would be almost impossible. So we declined to adopt the provisions which are now in the Petrillo Act. After all, that statute applies to only one industry. Those provisions are now the subject of court procedure (*sic*). Their constitutionality has been questioned. We thought that probably we had better wait and see what happened, in any event, even though we are in favor of prohibiting all featherbedding practices. However, we did accept one provision which makes it an unlawful-labor practice for a union to accept money for people who do not work. That seemed to be a fairly clear case, easy to determine, and we accepted that additional unfair labor practice on the part of unions, which was not in the Senate bill."

Prepared statement of Senator Taft giving detailed summary of differences between House, Senate and Conference Bills, 93 Cong. Rec. 6443, June 5, 1947 (History p. 1540):

Mr. Taft:

"Section 8(b)(6) of the conference agreement covers a matter with which the House bill dealt extensively under the topic of featherbedding practices. There was no corresponding provision in the Senate amendment. The provisions in the House bill made unlawful and enjoinable any strike to compel an employer to accede to featherbedding practices. Among the activities defined as a featherbedding practice by the House bill were: (a) Agreeing to employ persons in excess of the number reasonably required, (b) paying money in lieu of employing such an excess number of persons, (c) paying more than once for

services performed, (d) paying money for servic
not performed, and (e) paying a tax for the privile
of using certain articles or operating certain machin
or agreeing to restrictions upon their use. While t
Senate conferees were in sympathy with the obje
tives of this portion of the House bill, it seemed
them that it was almost impossible for courts to d
termine the exact number of men required in hu
dreds of industries and all kinds of functions. T
provisions in the Lea Act from which the House la
guage was taken are now awaiting determination
the Supreme Court, partly because of the proble
arising from the term 'in excess of the number of e
ployees reasonably required.' Therefore, the co
ferees were of the opinion that general legislation
the subject of featherbedding was not warranted
least until the joint study committee proposed by th
bill could give full consideration to the matter. Sin
the matter of exacting money for services not to
performed borders definitely on extortion, the co
ferees agreed to the insertion of a paragraph (sec.
(b) (6)) which makes it an unfair labor practice
cause or attempt to cause employers to pay mon
under such circumstances."

Colloquy between Senators Pepper and Taft, 93 Con
Rec. 6446, June 5, 1947 (History pp. 1544-5):

"Mr. Pepper. Does the provision to which t
Senator just referred include language about exa
tions in connection with featherbedding?

Mr. Taft. Yes.

Mr. Pepper. The Senator was speaking abo
subparagraph (6) of section 8, on page 8.

Mr. Taft. That is correct. It makes it an unfa
labor practice, to cause or attempt to cause an e
ployer to pay or deliver or agree to pay or deliver a
money or other thing of value, in the nature of an e
action, for services which are not performed or not
be performed.'

Mr. Pepper. The definition of 'exact' in Webster's New International Dictionary, second edition, unabridged, is as follows:

To demand or require authoritatively or peremptorily; to enforce the payment of or a yielding of; to compel to yield or furnish; hence to wrest; as a fee or reward when none is due.

Would it be an unfair labor practice for a group of women working in a textile mill to insist upon the employer giving them a rest period of 15 minutes each morning, and to be paid for that work period when they were not actually working?

Mr. Taft. No; I do not think that is in the nature of an exaction.

Mr. Pepper. Suppose they said they were going to strike if they did not get the rest period, and they therefore forced the employer to give it to them as a condition of continuing to work.

Mr. Taft. They are paid for the work they do.

Mr. Pepper. But they are paid for the 15 minutes when they are resting and not working.

Mr. Taft. In my opinion that would not be a violation of this section.

Mr. Pepper. There are contracts in force between a great many unions and employers under which, if a worker reports for work in the morning at the appointed time and finds that he is not going to be required to work that day, the employer must pay him for the day's work. Would insistence by a labor union upon payment of a day's pay to a worker who reported for work in the morning, when the employer gave him no work to do when he got there, be considered an exaction?

Mr. Taft. No; I do not think that is in the nature of an exaction. He is paid for coming to work at the request of the employer. It is not in the nature of an exaction.

Mr. Pepper. What I wanted to emphasize to the able Senator is that the language in the conference re-

port is so broad that it would clearly include such a situation, because it is provided that it shall be an unfair labor practice to 'cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed.'

It seems to me that the language is broad enough to cover both the cases which I have mentioned, because they involve a demand that payment be made for time when actually no work was performed.

Mr. Taft. I am sorry to disagree with the Senator, but it seems to me that it is perfectly clear what is intended. It is intended to make it an unfair labor practice for a man to say, 'You must have 10 musicians, and if you insist that there is room for only 6, you must pay for the other 4 anyway.' That is in the nature of an exaction from the employer for services which he does not want, does not need, and is not even willing to accept."

Statement on the floor by Senator Murray, 93 Cong. Rec. 6498, June 6, 1947 (History pp. 1570-1):

"Mr. Murray. * * *

"The other new unfair labor practice is that with respect to so-called featherbedding. Under a new section 8(6) it is an unfair labor practice to force or require an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed. Let me observe at the outset that what is featherbedding to an employer is invariably something else to the workers. Most frequently such provisions are designed to protect the safety of the workers; many of the contract terms covering railway workers which are claimed to be featherbedding actually had their origin, and continue to have a justification, in safeguarding the life and health of the workers. Full-crew provisions, auto-

matic-coupler requirements, required signal and watchman protections, are examples.

* * *

Mr. Taft. I want to point out that railway labor has never been covered by the Wagner Act; it has always been covered by the Railway Labor Act, which provides a somewhat different procedure. We saw no reason to change that situation, because there were no abuses which had arisen in connection with the operation of the Railway Labor Act. In general, we confined our amendments to the bill to acts which, from evidence before the committee, were specifically shown to be abuses.

Mr. Murray. I am referring to the so-called feather-bedding activities in the railroad industry as illustrations of matters that may be insisted upon by workers as a matter of safety for the protection of their health and life. I am merely using them as illustrations of so-called 'feather bedding' which can be justified.

In the mining industry the stationing of men to handle ventilation equipment or to conduct inspections are demanded by the men for their protection. More often, perhaps, these union requirements are directed at the speed-up; there is a limit to physical endurance and many employers have in the past, and would be willing again, to work their men beyond that point did not provisions in the contracts protect them. Speed-up in the automobile industry which existed prior to organization was the main grievance of the workers. Frequently unions impose these conditions for the economic security of their members. Where employment is sporadic and highly skilled the maintenance of the industry itself may demand that men be paid for services not to be performed. We do not cut off the pay of our generals in time of peace; we do not pay a lighthousekeeper only when he is trimming the lamps; we do not pay a watchman only while engaged in the business of catching criminals.

This provision is merely a demand that the risks of job insecurity, intermittent employment, and slack be borne by the workers entirely and not by industry. It is of a piece with that industrial practice which in times of depression lays off the men in the shop without even reducing the salary of the vice president."

Statutory analysis offered by Senator Murray, 93 Cong. Rec. 6501, 6503, June 6, 1947 (History p. 1578):

"Mr. Murray.

"Analysis of Title I of H. R. 3020, Taft-Hartley Bill.

* * *

"The provisions of section 8 (b) (6) are directed against so-called feather-bedding practices. This section was also added by the conference committee. This provision like so many other provisions of the bill, although directed toward a desirable objective, could easily be used to interfere with legitimate union activities. In evaluating the possible impact of this section it must be borne in mind that many of the practices now viewed as feather-bedding practices had their origin in the health and safety requirements of workers. The determination, therefore, of whether a particular demand by a union for the employment of additional help is in effect featherbedding or a legitimate demand would in many cases require a detailed knowledge of the requirements of the particular company involved. The difficulty of accumulating this type of information and the type of experience necessary to make a just determination of the issue is obvious.

"The chief danger in the provision is that it may restrict labor organizations in their attempts to combat speed-ups, to protect the safety and health of the workers, and to spread the burden of unemployment. These considerations suggest that the solution of this problem could better be left to the collective bargaining process."

Statement by Senator Pepper, 93 Cong. Rec. 6514, June 6, 1947 (History p. 1590):

"Mr. Pepper.

"Mr. President, I pass on to the next subject I wish to consider, which is paragraph (6), which reads as follows:

To cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or any other thing of value, in the nature of an exaction, for services which are not performed or not to be performed.

We had some discussion regarding that yesterday. The able Senator from Ohio submitted his views. I asked the Senator from Ohio two questions: First, what about the case of a group of women workers who demand of the employer a 15-minute rest period every morning, and maybe another one in the afternoon, and who demand pay for the time they are resting? That comes within the language of the bill, in my opinion. At least it is a litigable subject, and this bill is replete with opportunities on the part of employers to sue the unions, to claim an injunction, or to claim some kind of redress from the National Labor Relations Board.

I pointed out another case to the Senator from Ohio. In the contracts of most of the unions I am told that a worker reports for work in the morning. The employer may say, 'I do not have anything for you today.' The worker has gotten up and gone there. He is ready. Under union contracts the worker can get pay for that day, though he does not work. If he strikes or threatens to strike for such a provision in the contract he comes squarely within this language of demanding pay for a time when he did not work. This is a subject of litigation, and I shall come later to a provision of the bill which will show that one of the ways that the employer can wreck a union is to keep his high-price corporation counsel busily engaged

suing the union, attaching its funds, and in other ways making the operation of the union impossible or extremely difficult."

Excerpt from statement of House Conference Managers, 93 Cong. Rec. 6534, June 6, 1947 (History p. 1618):

"* * * .

"It is also made an unfair labor practice for a labor organization or its agents to cause or attempt to cause an employer to pay any money or thing of value, in the nature of an exaction, for services which are not performed or not to be performed. This provision derives from the provisions of the House bill relating to 'featherbedding' practices."

Supplementary analysis offered by Senator Taft, 93 Cong. Rec. 6859, June 12, 1947 (History pp. 1623-4):

"Section 8 (b) (6): This is a section taken from the elaborate prohibitions in the House bill with respect to featherbedding. All that it does is to make it an unfair labor practice to cause or attempt to cause employers to pay money in the nature of an exaction for services which are not performed or not to be performed. A number of Senators have contended that this means that union requests for payment to employees of wages for lunch and rest periods or for waiting periods when machinery is being repaired will be illegal. It has also been stated that it would be a breach of this section for employees who are asked to report for work so as to be available as a relief squad in the event of emergency or need, to demand any money for their time. Of course this section does not affect such industrial practices, as such activities are done at an employer's request and for valuable consideration incident to the employment itself. The use of the words 'in the nature of an exaction' makes it quite clear that what is prohibited is extortion by labor organizations or their agents in lieu of providing services which an employer does not want."

Statement of Senator Ball respecting Presidential veto message, 93 Cong. Rec. 7529, June 23, 1947 (History p. 1639):

Mr. Ball:

"Mr. President, in his second list of objections to the bill, under paragraph (3) of his veto message, the President has this to say:

> The bill presents the danger that employers and employees might be prohibited from agreeing on safety provisions, rest-period rules, and many other legitimate practices, since such practices may fall under the language defining "feather bedding."

Mr. President, that again is a complete distortion of the actual wording of the section to which the President refers, which is 8 (b), which makes it an unfair practice for a labor organization—

> 6. To cause or attempt to cause an employer to pay or deliver, or to agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed.

There is not a word in that, Mr. President, about 'featherbedding.' It says that it is an unfair practice for a union to force an employer to pay for work which is not performed. In the colloquy on this floor between the Senator from Florida and the Senator from Ohio, before the bill was passed, it was made abundantly clear that it did not apply to rest periods, it did not apply to speed-ups or safety provisions, or to anything of that nature; it applied only to situations, for instance, where the Musicians' Federation forces an employer to hire one orchestra and then to pay for another stand-by orchestra, which does not work at all."